

12/29/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
S.B. COLLINS, INC.,) RCRA Docket No. I-90-1042
)
Respondent)

Resource Conservation and Recovery Act -- hazardous waste exports -
- Respondent's exports from Vermont of tank bottoms, an ignitable
hazardous waste by EPA standards, were therefore subject to EPA's
regulation of hazardous waste exports, notwithstanding that
Vermont, a state authorized by EPA to administer its own program,
has its own regulation for tank bottoms.

RULING ON THE REGULATION
OF HAZARDOUS WASTE EXPORTS

This Ruling addresses the regulation of hazardous waste
exports. More specifically, it addresses the interaction between
the regulation of these exports by the U.S. Environmental
Protection Agency ("EPA") and their regulation by the State of
Vermont. The authorization for the EPA regulation, and for this
proceeding, is the Resource Conservation and Recovery Act, 42
U.S.C. §§ 6901-6992k ("RCRA").

Complainant is the Regional Administrator, Region I, EPA.
Respondent is S.B. Collins, Inc., a Vermont fuel distribution and
sales company that stores virgin heating oil on site and
distributes it to service stations in the area. Respondent also
collects from service stations in Vermont the residues--called
"tank bottoms"--from the bottoms of their tanks, stores the tank
bottoms on site, and contracts for their shipment for disposal to
Canada. The tank bottoms in this case, a mixed gasoline and water
waste product, are the exports at issue in this Ruling.

Complainant charged in a March 30, 1990 Complaint that
Respondent had exported tank bottoms to Canada in 1987-1989 without
an advance notification of and subsequent reporting to EPA and
without a recordkeeping of the exports that are required by EPA
regulations. Complainant alleged also in the Complaint that
Respondent's storage tanks lacked certain documentation and a leak
detection system, and that they were not inspected daily, each of
which was required by EPA regulations. Respondent's May 7, 1990
Answer essentially denied all the charged violations.

After negotiations failed to produce a settlement, the parties agreed to focus first on the charges involving Respondent's exports. These charges, the parties concurred, turn essentially on whether EPA's regulations apply to the exports. Respondent's defense was that the pertinent Vermont regulations removed its exports from the coverage of EPA's regulations.

To resolve the issue, the parties agreed to brief their positions for a decision on the written record. The EPA regulations at issue here are codified at 40 C.F.R., Part 262, Subpart E. Hence the parties briefed the following question.

Were the tank bottoms alleged to have been exported subject to the requirements set forth in 40 C.F.R., Part 262, Subpart E?

This Ruling addresses that question.

Arguments of the Parties

This Subpart E of the EPA regulations was promulgated in 1986, under RCRA, to control the export of hazardous waste. Subpart E is coordinated with the RCRA provisions pursuant to which EPA authorizes states to administer their own hazardous waste programs. Vermont is a state that has been so authorized.

The background for the dispute between Complainant and Respondent is expressed in EPA's 1986 promulgation of its export regulations for hazardous waste.

In the preamble to the proposed rule, EPA explained that where a State has obtained authorization, "hazardous waste" for the purposes of the export requirements would be the authorized State's universe of hazardous wastes plus wastes [not relevant here]....¹

EPA's promulgation continued as follows.

The "authorized State universe" of hazardous wastes consists of: (1) Those wastes in the Federal universe for which the State was authorized at the time it first received final authorization and (2) any wastes [not relevant here].... The authorized State universe does not include wastes which are identified or listed by the State as hazardous wastes under State law but are not identified or listed as such by EPA.²

¹ 51 Federal Register 28678 (August 8, 1986).

² 51 Federal Register 28679 (August 8, 1986).

Complainant's Argument

Complainant argued that Respondent's tank bottoms were part of "the Federal universe for which ... [Vermont] was authorized at the time it first received final authorization," and therefore were part of Vermont's "authorized State universe." The tank bottoms were part of the Federal universe, according to Complainant, because they were ignitable within the meaning of Section 261.21 of EPA's hazardous waste regulations (40 C.F.R. § 261.21).

A solid waste, pursuant to Subpart C of these EPA regulations (40 C.F.R. Part 261, Subpart C), is hazardous if it exhibits any of four characteristics: ignitability, corrosivity, reactivity, or toxicity. One provision of this Subpart C that is involved in the interaction between the EPA and Vermont regulations states that "[a] solid waste that exhibits the characteristic of ignitability has the EPA Hazardous Waste Number of D001."³

Since the tank bottoms were a hazardous waste by the Federal definition, Complainant contended that they must have been included within Vermont's authorized State universe. That conclusion follows, Complainant stated, because Vermont, to have received authorization to administer its own hazardous waste program, was required to cover the whole Federal universe in its program.

As evidence of that requirement, Complainant cited Section 271.9(a) of Part 271 of EPA's hazardous waste regulation, such Part bearing the title "Requirements for Authorization of State Hazardous Waste Programs" (40 C.F.R. Part 271). Section 271.9(a) provides as follows.

The State program must control all the hazardous wastes controlled under 40 CFR part 261 and must adopt a list of hazardous wastes and set of characteristics for identifying hazardous wastes equivalent to those under 40 CFR part 261.

To the same effect, Complainant cited Sections 6926 and 6929 of RCRA (42 U.S.C. §§ 3006, 3009).

In sum, according to Complainant, in promulgating its new Subpart E for hazardous waste exports in 1986, EPA said that in authorized States these regulations would apply to the State's universe of hazardous wastes. Vermont is an authorized State. Thus its universe, as Complainant read the 1986 statement, includes the Federal universe of such wastes, and the tank bottoms are within the Federal universe because of their ignitability. Complainant's final point was a reemphasis that Vermont could have become an authorized State only by controlling all Federal hazardous wastes.

³ 40 C.F.R. § 261.21(b).

Respondent's Argument

To avoid Complainant's charge, Respondent focused on another sentence in EPA's 1986 announcement quoted above of its new Subpart E.

The authorized State universe does not include wastes which are identified or listed by the State as hazardous wastes under State law but are not identified or listed as such by EPA.

Respondent's defense was that its tank bottoms were wastes such as described by this sentence.

Respondent developed this argument by pointing to two sections of the Vermont Hazardous Waste Management Regulations. Section 7-204(1) defines an ignitable hazardous waste in substantially the same manner as the EPA definition. Section 7-204-(2) then states as follows.

A waste which exhibits the characteristics of ignitability, and is not listed as a hazardous waste in 7-210 through 7-214 has the EPA Hazardous Waste Number of D001.

Section 7-210, titled Hazardous Wastes from Non-specific Sources, provides as follows.

The following wastes are listed hazardous wastes from non-specific sources:

....

VT 09... Residues from the bottoms of tanks (tank bottoms) containing materials which exhibit a characteristic described in Sections 7-204 through 7-208 or are listed in Section 7-210 through 7-214.

Respondent argued that, per Section 7-204(2), its tank bottoms were not EPA ignitable hazardous wastes number D001, because they were listed in Section 7-210. Moreover, continued Respondent, all tank bottoms, whether ignitable or not, are Vermont hazardous wastes because they come within paragraph VT 09 of Section 7-210, a paragraph that states that the mere listing therein designates the tank bottoms as hazardous wastes.

EPA regulations, Respondent noted, contain no hazardous waste category for "tank bottoms." Therefore, Respondent concluded, they are "wastes which are identified or listed by the State as hazardous wastes under State law but are not identified or listed as such by EPA," and thus, by EPA's own 1986 statement, fall outside the "authorized State universe." Respondent observed that

these Vermont regulations were "poorly drafted;" but EPA, having "approved" these regulations when it authorized Vermont to administer its own hazardous waste program, is now, suggested Respondent, stuck with the consequences.⁴

To bolster its argument further, Respondent cited three letters from State of Vermont authorities. Each referred in some way to the State's own regulation of hazardous wastes.

Complainant's Rebuttal

In rebuttal, Complainant repeated the requirement that a State program for hazardous waste, to receive EPA's authorization, must cover all the hazardous wastes within the Federal program. Respondent's tank bottoms, noted Complainant, were hazardous waste by Federal standards because of their ignitability. Therefore, concluded Complainant, they must have been one of "[t]hose wastes in the Federal Universe for which the State was authorized at the time it first received final authorization," and thus part of Vermont's "authorized State universe."

Complainant's rebuttal argued that this conclusion is not only mandated by Federal law, but it is also perfectly consistent with Vermont's regulations. Section 7-204(2) means, Complainant stated, that an ignitable hazardous waste that "is not listed as a hazardous waste in Sections 7-210 through 7-214 has the EPA Hazardous Waste Number of D001." But an ignitable hazardous waste that is so listed should also, contended Complainant, be given this EPA number under the Vermont regulations. That designation would accord with Vermont Section 7-202(4), which provides as follows.

If a waste is identified by both EPA and Vermont hazardous waste numbers and descriptions, the EPA hazardous waste number and description shall be used for the purposes of this chapter.

Such designation would accord also, observed Complainant, with the principle of statutory construction that, wherever possible, statutory provisions should be construed so as to be consistent with each other. The Vermont code VT 09 would then, by Complainant's approach, apply to wastes that fall outside the federally designated category of hazardous waste, e.g., because they exhibit no ignitability, corrosivity, reactivity, or toxicity.

Complainant pointed out finally that the Vermont regulations treat corrosive and reactive wastes in the same way that they do ignitable wastes. Therefore, were Respondent's interpretation to be accepted, the coverage of Vermont's hazardous waste program would be significantly less than the Federal coverage for all these types of waste.

⁴ Submittal of S.B. Collins, Inc. in Response to Presiding Officer's Order of February 28, 1991, at 7 (May 1, 1991).

Decision

Complainant's position is correct. It is abundantly clear both from RCRA and from EPA's regulations that a State's hazardous waste program, to become authorized by EPA, must cover at least as much hazardous waste as EPA's hazardous waste regulations. Therefore, if Respondent's tank bottoms were ignitable by EPA's definition, they must have come within "the Federal universe for which ... [Vermont] was authorized at the time it first received final authorization." Accordingly, they were subject to Subpart E of EPA's hazardous waste regulations.

The references in the letters from State of Vermont authorities cited by Respondent do not alter this conclusion. These references merely identify the applicability of Vermont regulations to certain wastes; the references do not assert the inapplicability of Federal regulation to these wastes.

Respondent's interpretation of the interaction between the regulation of hazardous wastes by EPA and by Vermont is thus rejected. Indeed, it would effectively gut the regulation of exports from Vermont of ignitable, corrosive, and reactive hazardous wastes, a result obviously at variance with the intent of both the Vermont and the Federal regulation. It would be a result at variance also, as noted, with the Federal statutory and regulatory provisions under which Vermont was authorized to administer its hazardous waste program. Accordingly there are compelling legal grounds for declining Respondent's proffered interpretation.

Nonetheless, Respondent's interpretation does not lack all plausibility; the Vermont regulations are confusing, as Respondent has suggested. This confusing nature of these regulations is a factor that can legitimately mitigate the amount of any sanction to be imposed on Respondent.

Other issues exist in this case besides the one addressed in this Ruling. With the benefit of this Ruling, however, the parties may be able to negotiate a settlement of these remaining questions. They will be directed at least to make the attempt.


Ruling

This Ruling addresses the following question.

Were the tank bottoms alleged to have been exported subject to the requirements set forth in 40 C.F.R., Part 262, Subpart E?

For the reasons stated above, the answer to this question is in the affirmative.

The parties are directed to try to negotiate a settlement of the remaining issues in this case. Complainant is directed to report by February 28, 1994 on the status of the negotiations.


Thomas W. Hoya
Administrative Law Judge

Dated: December 29, 1993

IN THE MATTER OF S.B. COLLINS, INC., Respondent,
RCRA Docket No. I-90-1042

Certificate of Service

I certify that the foregoing Ruling on the Regulation of Hazardous Waste Exports, dated December 29, 1993, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

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Dated: December 29, 1993